

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

ARMANDO BARAGAN	:	MOTION TO VACATE
RAMIREZ,	:	28 U.S.C. § 2255
BOP Reg. # 55008-019,	:	
Movant,	:	
	:	CRIMINAL ACTION NO.
v.	:	1:03-CR-493-ODE-AJB-12
	:	
UNITED STATES OF AMERICA,	:	CIVIL ACTION NO.
Respondent.	:	1:16-CV-4290-ODE-AJB

**UNITED STATES MAGISTRATE JUDGE'S
FINAL REPORT AND RECOMMENDATION**

Movant, Armando Baragan Ramirez, confined in the Beaumont Low Federal Correctional Institution in Beaumont, Texas, has submitted a 28 U.S.C. § 2255 motion to vacate, set aside, or correct his sentence in criminal action number 1:03-cr-493-ODE-AJB-12. [Doc. 2598.]¹ The matter is before the Court for preliminary review pursuant to Rule 4(b) of the Rules Governing Section 2255 Proceedings. For the reasons discussed below, the undersigned **RECOMMENDS** that the § 2255 motion be **DISMISSED** as impermissibly successive.

¹ Citations to the record in this Final Report and Recommendation refer to case number 1:03-cr-493-ODE-AJB-12.

I. Discussion

In a second superseding indictment returned on December 7, 2004, Movant was charged with the following offenses: (1) conspiracy to possess with intent to distribute cocaine, methamphetamine, and marijuana, in violation of 21 U.S.C. §§ 841(b)(1)(A)(ii), (vii), (viii) and 846, (2) possession of a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. § 924(c)(1)(A), and (3) conspiracy to commit money laundering, in violation of 18 U.S.C. § 1956(h). [Doc. 1040 at 2-4, 7, 17-19.] On January 24, 2005, a jury found Movant guilty of all three charges. [Doc. 1450.] On August 2, 2005, the District Court sentenced Movant to 295 months imprisonment. [Doc. 1772 at 2.] The United States Court of Appeals for the Eleventh Circuit affirmed on April 19, 2007. *See United States v. Garcia-Jaimes*, 484 F.3d 1311 (11th Cir. 2007) (consolidated appeal). [Doc. 2063.]

Movant executed his first § 2255 motion on June 12, 2008. [Doc. 2106 at 18.] The District Court denied the § 2255 motion on the merits on September 15, 2010. [Doc. 2339.] The Eleventh Circuit denied Movant's motion for a certificate of appealability on June 3, 2011, and denied reconsideration on September 29, 2011. [Docs. 2409, 2450.] On December 23, 2015, the District Court issued an amended order reducing Movant's sentence to 248 months imprisonment. [Doc. 2560.]

Movant filed the present § 2255 motion on November 16, 2016. [Doc. 2598.]

Movant argues that (1) the District Court improperly applied the sentencing enhancement in U.S.S.G. § 3B1.1(a) for organizing the conspiracy, and (2) he is “eligible for the retroactive minor role reduction” in U.S.S.G. § 3B1.2, pursuant to *United States v. Quintero-Leyva*, 823 F.3d 519 (9th Cir. 2016). [*Id.* at 2-4.]²

Summary dismissal of a § 2255 motion is proper “[i]f it plainly appears from the motion, any attached exhibits, and the record of prior proceedings that the moving party is not entitled to relief” Rule 4(b), Rules Governing Section 2255 Proceedings for the United States District Courts. Unless the Eleventh Circuit authorizes a second or successive motion to vacate, the District Court lacks subject matter jurisdiction to consider such a motion. *See* 28 U.S.C. §§ 2244(b)(3)(A) & 2255(h); *Farris v. United States*, 333 F.3d 1211, 1216 (11th Cir. 2003) (per curiam).

Because Movant’s first § 2255 motion was denied on the merits, he must obtain authorization from the Eleventh Circuit for the District Court to consider a second or successive § 2255 motion. Movant has failed to obtain the necessary authorization.

² The United States Court of Appeals for the Ninth Circuit (1) held that the “retroactive minor role reduction” to which Movant refers “applies . . . in direct appeals,” but (2) did not consider whether “a defendant who has exhausted his direct appeal can move to reopen sentencing proceedings.” *Quintero-Leyva*, 823 F.3d at 521 & n.1.

Therefore, the District Court lacks subject matter jurisdiction to consider the present § 2255 motion. *See United States v. Florence*, 411 Fed. Appx. 230, 231 (11th Cir. Jan. 25, 2011) (per curiam) (stating that absent authorization to file second or successive § 2255 motion, district court lacks subject matter jurisdiction).

II. Conclusion

For the reasons stated above,

IT IS RECOMMENDED that (1) the § 2255 motion, [Doc. 2598], be **DISMISSED** as impermissibly successive, and (2) civil action number 1:16-cv-4290-ODE-AJB be **DISMISSED**.³

The Clerk is **DIRECTED** to terminate the referral of the § 2255 motion to the undersigned.

³ The undersigned offers no recommendation regarding a certificate of appealability because 28 U.S.C. § 2253(c) does not apply to this case. *See Hubbard v. Campbell*, 379 F.3d 1245, 1247 (11th Cir. 2004) (per curiam) (explaining that (1) dismissal of habeas petition for lack of subject matter jurisdiction is not “a final order in a habeas corpus proceeding” within the meaning of § 2253(c), and (2) Eleventh Circuit has jurisdiction to review dismissal under 28 U.S.C. § 1291); Rule 11(a) of the Rules Governing Section 2255 Proceedings (indicating that § 2253(c) applies to § 2255 motions).

IT IS SO RECOMMENDED and DIRECTED, this 5th day of December, 2016.



ALAN J. BAVERMAN
UNITED STATES MAGISTRATE JUDGE